UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 860,

Case No. 8-CD-86140

*

Charged Party,

*

and

*

MCNALLY KIEWET ECT JV,

POST-HEARING BRIEF OF LABORERS' LOCAL 860

Employer/Charging Party,

*

and

*

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,

*

Party-In-Interest.

*

I. STATEMENT OF THE CASE

This matter is before the Board under Section 10(k) of the National Labor Relations Act ("the Act"). McNally Kiewet ECT JV ("MK" or "Employer") filed an unfair labor practice charge on July 27, 2012 alleging that Laborers' International Union of North America, Local 860 ("Laborers' Local 860") violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with the object of forcing or requiring the Employer to assign certain pipe segment installation work to employees represented by Laborers' Local 860 rather than employees represented by International Union of Operating Engineers, Local 18 ("Operating Engineers"). A hearing was conducted before Hearing Officer Catherine Modic on October 18 and 19, 2012.

Although the parties could not stipulate to the work in dispute, the record demonstrates that the work in dispute is the construction of segments of a tunnel support

system by the segment preparation person, ring builder 1, and ring builder 2 on the Euclid Creek Tunnel project ("Project") by the Employer in Cleveland, Ohio ("work in dispute" or "disputed work"). (Tr. 15-21, 23.) Construction of the Project is ongoing. (Tr. 180.) Importantly, as demonstrated below, the Employer has a clear preference in making an assignment of the disputed work to its workers represented by Laborers' Local 860. (Tr. 173.) Moreover, the collective bargaining agreements, (Jt. Exs. 1-4), past practice, (Tr. 177), area practice, (Tr. 177-178), economy and efficiency of operations, (Tr. 178), and relative skills and training, (Tr. 176-177, 294-296, 322, 324; Laborers' Ex. 2), all clearly favor an award of the disputed work to the Employer's workers represented by Laborers' Local 860.

II. JURISDICTION

MK is an employer engaged in commerce within the meaning Sections 2(6) and (7) of the Act. (Tr. 13-14.) Specifically, the parties stipulated that:

Mcnally Kiewit ECT JV is a partnership with an office located at 24700 Center Ridge Road, Suite 215, Westlake, Ohio, and a principal job site located at 786 East 140th Street, Cleveland, where it is engaged in the construction of the Euclid Creek Tunnel and related structures.

Within the 12 months preceding the filing of the charge, the Employer purchased and received at this job site goods and services valued in excess of \$50,000 directly from points located outside the state of Ohio.

(Tr. 13.) The Employer is not failing to conform to a Board certification or order concerning the assignment of the work in dispute on this or any other project. (Tr. 23-24.) Further, the parties stipulated that Laborers' Local 860 and Operating Engineers both are labor organizations within the meaning of Section 2(5) of the Act. (Tr. 14-15.) Although the parties could not stipulate that there is no voluntary adjustment procedure in place

between the Employer, Laborers' Local 860, and Operating Engineers to resolve the dispute, the record demonstrates there is none. (Tr. 175.) Finally, the parties stipulated there are no court proceedings related to this matter. (Tr. 26-27.)

III. THE DISPUTE

A. Factual Background

The Employer is a partnership between two competitors formed to construct the Euclid Creek Tunnel and related structures. (Tr. 13.) The Employer's Project Manager and sole witness, Tom Szaraz, has worked in the tunneling industry for twenty-three years. (Tr. 35, 37.) Tunneling, stated simply, is the horizontal excavation of earth. (Tr. 37-38.) On the Project, the Employer is responsible for constructing 18,000 feet of 24-foot diameter sewer tunnel approximately 200 feet underground. (Tr. 36.) The purpose of this particular tunnel is to prevent raw sewage from dumping into Lake Erie and local rivers. (Tr. 37.) The tunnel will pick up water overflows during heavy rain and will store the water, allowing the water to be treated while it sits in the tunnel. (*Id.*)

Excavation on the Project is being completed by a tunnel-boring machine or TBM. (Tr. 38.) The TBM is 370 feet long and 27 feet in diameter. (Tr. 38.) As the TBM bores a 27-foot diameter hole, workers construct the permanent tunnel lining simultaneously. All tunnels need to be supported as they are constructed. (Tr. 60.) There are various different methods of constructing tunnel support systems, and building "rings" is one of them. (*Id.*) Using the ring-building method, the tunnel lining is constructed in segments. (Tr. 40.) Workers connect six segments of various shapes and sizes of pre-cast concrete in the tunnel to build a complete circle or ring. (*Id.*) The segments form a part of the finished tunnel lining, (Tr. 58.), and each completely constructed ring of six segments measures

about 5 feet in length. (Tr. 40.) Each completed 5-foot ring weighs about 60,000 pounds. (Tr. 59.)

The Employer and several others in the industry use members of local affiliates of the Laborers' International Union of North America, like Laborers' Local 860, to build the rings. Members of Laborers' Local 860 utilize various tools to perform the work in dispute on the Project, including an erector, air impact wrench, brooms, shovels, and an unloader. (Tr. 84.) The Employer uses workers falling under three different job descriptions to complete the work in dispute: the segment preparation person ("SPP"), ring builder 1 ("RB1"), and ring builder 2 ("RB2"). (Tr. 91; Employer Exs. 14, 22, 27.) To begin, the SPP, after twelve segments at a time are brought in the tunnel by railcars, (Tr. 93-94, 98), unloads the segments using a hydraulic unloader. (Tr. 97-98.) After unloading the segments, the SPP will perform an initial inspection and clean them. (Tr. 98.) The SPP then moves each segment to a feed table. (Tr. 99.) That segment is, at that time, rotated on the feed table into the appropriate position for installation and then cleaned again. (Id.) To assist in aligning the segments, holding them in place, and keeping gaskets compressed upon installation, the SPP hammers dowels into each of the segments. (Tr. 100, 104-105.) That process is repeated with each segment until a single ring is constructed, at which point the SPP installs foam packing, i.e., weather stripping, on the surface of the ring. (Tr. 105.) Additionally, the SPP assists other members of Laborers' Local 860 with "leapfrogging" the tunnel-boring machine's rail forward. (Tr. 106-107, 110.) The SPP also assists others members of Laborers' Local 860 that are building additional rail for the segment-delivering railcar. (Tr. 112.) Finally, the SPP must also keep various areas of the TBM and tunnel clean, using a hose, broom, and shovel. (Tr. 112-118.)

Working in conjunction with the SPP (and various other members of Laborers' Local 860), the RB1 and RB2 workers perform similar job functions. The RB1 controls the hydraulics of the TBM's thrust cylinders after the TBM stops every five feet. (Tr. 128-129.) After the TBM stops moving, the RB1 will perform the final inspection of each segment before installation as tunnel lining. (Tr. 138-139.) The RB1 will, with the assistance of the RB2, verify the precise sequence of installation of the six segments. (Tr. 129-131.) They both do this by looking at identification marks on each of the segments. (Tr. 132.) The RB1 will then jockey the segments into their proper position in the tunnel lining system. (Tr. 137-139.) The RB1 also is responsible for keeping the tail can clean and clear. (Tr. 139.) Finally, the RB1 will assist other members of Laborers' Local 860 with drilling, grouting, cleaning, and moving rails for the both the segment-delivering railcar and the TBM. (Tr. 139-140.)

Similarly, the RB2 is required to take measurements to verify each segment being delivered will clear the TBM. (Tr. 150.) After the segments are in place, the RB2 will bolt the segments together using an impact wrench. (*Id.*) The RB2 assists other members of Laborers' Local 860 with the grouting operation by drilling verification holes and then patching those holes. (*Id.*) Finally, the RB2 is responsible for keeping areas clean and will assist in moving rails for both the railcar and TBM. (*Id.*)

Currently, the Employer is utilizing three shifts of workers on the Project—two shifts of workers are tunneling and one shift is performing only maintenance work. (Tr. 91.) All three positions—the SPP, RB1, and RB2—are being utilized during two shifts on the Project. (Tr. 91, 163.) The Employer decided to assign the SPP, RB1, and RB2 work to the members of Laborers' Local 860 because, importantly, members of Laborers' Local 860

have traditionally installed tunnel support systems. (Tr. 92-93.) Further, the Employer knows that members of Laborers' Local 860 possess the best skills and training to perform this work. (Tr. 93). As discussed below, the Board should award the work in dispute according to, among other things, the Employer's preference, which is that members of Laborers' Local 860 perform the disputed work on the Project.

B. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(ii)(D) has been violated. This standard requires finding there is reasonable cause to believe that: (1) there are competing claims for the disputed work among rival groups of employees, *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001); (2) a party has used proscribed means to enforce its claim to the work in dispute, *see*, *e.g.*, *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004); and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute, *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1138-1139 (2005).

1. There Are Competing Claims for the Work

Both Laborers' Local 860 and the Operating Engineers claim the disputed work on the Project. To begin, the Operating Engineers filed a grievance concerning the disputed work on the Project.¹ (Jt. Exs. 5-6.) The Operating Engineers Business Representative Dave Russell, in addition to filing the grievance, orally claimed the work on three different occasions, including once during the pre-job conference and twice while on the Project.

¹ Even if the Operating Engineers assert that the grievance is a pay-in-lieu grievance, the Board has long considered a pay-in-lieu grievance to be a claim for work. *Laborers' Local No. 113 (Michels Pipeline Construction)*, 338 NLRB 480, 482-83 (2002); *IBEW Local 701 (Federal Street Construction)*, 306 NLRB 829, 830-31 (1992).

(Tr. 164-166, 175-176, 297, 299-300.) During these various discussions with Project Manager Szaraz, Russell requested that the disputed work be assigned to members represented by the Operating Engineers. He even presented the Employer with a standard form for assignment of the disputed work. (Tr. 164-165; Employer Ex. 34.) On the other hand, Laborers' Local 860 also claimed the work in dispute, as indicated in Business Manager Liberatore's July 23, 2012 letter. (Jt. Ex. 7; Tr. 320-321.) Further, members of Laborers' Local 860 are currently performing the disputed work on the Project. (Tr. 83.) Finally, Liberatore claimed the disputed work on the Project for members of Laborers' Local 860 at the hearing. (Tr. 320.) Thus, despite the Operating Engineers' assertions to the contrary, both Laborers' Local 860 and the Operating Engineers claim the disputed work on the Project.

2. <u>Laborers' Local 860 Engaged in Proscribed Activity</u>

Laborers' Local 860, through its Business Manager's July 23, 2012 letter directed to the Employer, threatened picketing and work stoppages in the event the disputed work on the Project was assigned to members of the Operating Engineers. (Tr. 320-321; Jt. Ex. 7.) To be sure, section 8(b)(4)(D) of the Act provides that it is an unfair labor practice to encourage individuals to engage in a strike, or to threaten, coerce, or restrain any person engaged in commerce, where an object thereof is "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . ." Moreover, "[a] threat to strike and picket to force or require an employer to reassign disputed work constitutes reasonable cause to believe Section 8(b)(4)(D) has been violated." *Laborers' International Union of North America, Local 76*

(Albin Carlson Co.), 286 NLRB 698, 699-700 (1987). "A charged party's use of language that, on its face, threatens economic action is sufficient to find reasonable cause to believe Section 8(b)(4)(D) has been violated." *IBEW Local 71 (Thompson Electric)*, 354 NLRB No. 46, p. 4 (2009). There was no affirmative evidence at the hearing that the Laborers' threats were a sham. *Operating Engineers Local 150 (R&D Thiel)*, 340 NLRB 1137, 1140 (2005) (citing *Laborers' Indiana District Council (E&B Paving)*, 340 NLRB 150 (2003)). Thus, the Board should find that there is reasonable cause to believe that Laborers' Local 860 engaged in proscribed activity.

3. There Is No Method for Voluntary Adjustment of the Dispute

Although the parties could not stipulate that there is no voluntary adjustment procedure in place between the Employer, Laborers' Local 860, and the Operating Engineers to resolve the assignment of the disputed work, the witnesses knew of none. (Tr. 175.) The Operating Engineers presented no evidence to the contrary and, although it could not stipulate to the fact given arguments raised in its motion to quash, even conceded that "[t]here is no tri-party process to resolve this, apparently." (Tr. 28.) Simply, there is no agreement whatsoever between the Employer, Laborers' Local 860, the Operating Engineers to resolve the assignment of the work in dispute. Thus, the Board should find there is no method for the voluntary adjustment of this dispute between the parties and proceed to the merits of the dispute.

IV. THE MERITS OF THE DISPUTE

If the jurisdictional prerequisites have been met, Section 10(k) requires the Board to make an affirmative award of the disputed work to one of the groups of employees involved in the dispute. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*,

364 U.S. 573, 579 (1961). While the Act does not set out the standards the Board is to apply in making this determination, the Supreme Court has explained that "[e]xperience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board." *Id.* at 583. Consistent with the Court's opinion, the Board announced in *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402, 1410-11 (1962), that, in making the determination that the Supreme Court found was required by Section 10(k), the Board would consider "all relevant factors," and that its determination in a jurisdictional dispute would be an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *See generally TeMKters Local 174 (Airborne Express)*, 340 NLRB No. 20, slip op. at 4 (2003). Overall, the applicable factors overwhelmingly favor awarding the disputed work on the Project to members represented by Laborers' Local 860.

A. The Language of the Agreements Favors the Laborers

According to *Machinists Lodge 1743 (J. A. Jones Construction*), one of the factors to consider in making the determination as to which craft should be assigned the work is the existence and terms of any agreements between the employer and the crafts. In this case, the agreements specifically favor the assignment of work to the Laborers. Laborers' Local 860 Business Manager Liberatore testified that the Laborers' Heavy Highway Agreement covers the tunneling work on the Project, including specifically those tasks performed by the Employer's SPP, RB1, and RB2 workers. (Tr. 315-316; Jt. Exs. 1-2.) While it is true that the exact words "segment preparation person," "ring builder 1," and "ring builder 2" do not appear verbatim in the agreement, Liberatore, on cross-examination, identified the exact provisions of the Heavy Highway Agreement that covered the disputed work. (Tr. 332-

333.) The Operating Engineers presented no witness testimony to the contrary.² Thus, the language of the agreements favors an award of the disputed work to the members of the Laborers.

B. Prior and Ongoing Employer Practice Both Favor the Laborers

No other project in the area has been performed precisely in this manner, but Laborers' Local 860's members have built tunnel support systems on all projects for the Employer. (Tr. 177, 180, 316.) There are various types of tunnel support systems—e.g., precast concrete; cast-in-place concrete; steel liner plate; steel rib and wood lagging; steel rib and steel lagging; rock bolts, wire mesh, and Shotcrete; fiberglass pipe—all of which have been built by members represented by Laborers' Local 860. (Tr. 62-79.) In fact, MK Project Manager Szaraz knows of no other union's members that actually construct tunnel support systems. (Tr. 66.) Further, members of Laborers' Local 860 are currently performing the work on the Project, (Tr. 83), and MK intends to continue its practice of assigning the disputed work to members of Laborers' Local 860. (Tr. 180.) The Operating Engineers presented no evidence to the contrary. Thus, the prior and ongoing practices favor an award of the disputed work to members of Laborers' Local 860.

C. The Employer's Preference Favors the Laborers

MK Project Manager Szaraz testified that MK prefers to assign tunnel support system work, i.e., work performed by the SPP, RB1, and RB2 on the Project, to the members of Laborers' Local 860. (Tr. 173.) The Operating Engineers presented no evidence to the

² It is anticipated that the Operating Engineers will argue that its Agreement clearly covers the work in dispute. Even where the Board has determined that one union's contract clearly covers work, it has not awarded disputed work to the members of those unions. *Laborers Local 368*, 305 NLRB 607, 608 (1991).

contrary. Thus, MK's preference favors an award of the work in dispute to members of Laborers' Local 860.

D. The Training and Skills to Perform the Work Both Favor the Laborers

MK Project Manager Szaraz indicated that the members of Laborers' Local 860 have the proper skills and experience to perform the disputed work. (Tr. 176.) Members of Laborers' Local 860 receive classroom training to construct tunnel support systems—including courses in safety, soil identification, rigging, fall protection, confined space protection, tunneling, and blueprint reading—at the Ohio Laborers' Training Center. (Tr. 322-324; Laborers' Exs. 1-2.) And given the unique nature of the Project, Szaraz testified that the Employer has provided additional training to members of Laborers' Local 860 on the Project site, some of which has been provided by the manufacturer of the tunnel-boring machine. (Tr. 176-177, 294-296.) The Operating Engineers presented no evidence concerning whether its members had the training and skills to perform the disputed work. Thus, this factor weighs in favor of an award of the disputed work to members of Laborers' Local 860.

E. Efficiency and Economy of Operations Favors the Laborers

MK competes with several companies for tunneling work, and those companies all use members of the Laborers' to perform the disputed work. (Tr. 177-178.) Obviously, in order to bid competitively and complete work in a timely manner, MK prefers to assign the work to members of Laborers' Local 860.³ (Tr. 173, 178.) This results in increased efficiency and economy of operations because members of Laborers' Local 860 can perform additional duties and assist other members of Laborers' Local 860 during down time,

 $^{^3}$ In its bid on the Project, the Employer used Laborers' Local 860 scale for estimated hours worked by the SPP, RB1, and RB2. (Tr. 93.)

whereas the Operating Engineers cannot. (Tr. 178-179.) In other words, using the Operating Engineers to perform the work in dispute would require MK to hire more workers who would perform fewer tasks, thereby increasing labor costs on the Project. (*Id.*) The Operating Engineers presented no evidence to refute Szaraz's testimony. Thus, the economy and efficiency of operations favor an award of the work in dispute to the members of Laborers' Local 860.

F. Area Practice Favors the Laborers

Members of the Laborers perform the work in dispute for MK and all its competitors. Members of Laborers' Local 860 build tunnel support systems for various contractors in the area and have done so for decades. (Tr. 177-178, 336-339.) The Operating Engineers presented no evidence to the contrary. Thus, the area practice favors an award of the disputed work to members of Laborers' Local 860.

V. CONCLUSION

For the foregoing reasons, the Board should award the work in dispute to the Employer's workers who are represented by Laborers' Local 860.

Dated this 23rd day of November 2012 in Sevier County, Tennessee.

Respectfully submitted,

MANGANO LAW OFFICES CO., L.P.A.

s/Ryan K. Hymore

, ,

Basil W. Mangano Ryan K. Hymore 2245 Warrensville Center Road, Suite 213 Cleveland, Ohio 44118 T. (216) 397-5844/F. (216) 397-5845 bmangano@bmanganolaw.com

Counsel for the Charged Party

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post-Hearing Brief was served this 23rd day of November 2012 via the NLRB's electronic filing system upon the following:

NLRB Region 8 - Cleveland, Ohio

And electronic mail upon the following:

Timothy M. Bittel, Esq. Hahn Loeser & Parks LLP 200 Public Square Suite 2800 Cleveland, OH 44114 Email: tbittel@hahnlaw.com

And

William I. Fadel, Esq. Tim Fadel, Esq. Wuliger, Fadel & Beyer, LLC The Brownell Building 1340 Sumner Court Cleveland, OH 44115

Email: wfblaw@wfblaw.com Email: tfadel@wfblaw.com

s/Ryan K. Hymore